

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MALIK ROBERTSON,

Petitioner,

**DECLARATION IN OPPOSITION
TO PETITION FOR HABEAS CORPUS**

-against-

04 Civ. 08 (NAM) (RFT)

DALE ARTUS, Superintendent,
Clinton Correctional Facility,

Respondent.

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NISHA M. DESAI, an attorney admitted to practice in the State of New York and before this Court, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that:

1. I am an Assistant Attorney General, of counsel to Eliot Spitzer, the New York State Attorney General. The Onondaga County District Attorney's Office initiated this prosecution against petitioner in state court and the Attorney General will represent respondent in this habeas corpus proceeding.

2. I am submitting this declaration and the accompanying memorandum of law in opposition to the pro se application for a writ of habeas corpus which was filed by petitioner Malik Robertson in the United States District Court for the Northern District of New York, on or about August 9, 2004. I make the statements in this declaration upon information and belief, based on my review of the records and files of the New York County District Attorney's Office.

3. By order of this Court, I am also submitting a copy of the petitioner's and the respondent's briefs on appeal (Exhibits A and B), the decision of the Appellate Division affirming petitioner's conviction (Exhibit C), petitioner's application for leave to appeal to the New York State Court of Appeals (Exhibit D), and the decision of the Court of Appeals denying leave (Exhibit E).

4. Respondent is also filing a copy of the state trial transcripts with the Clerk of the Court.¹

WHEREFORE, and for the reasons set forth in the accompanying memorandum of law, the petition for a writ of habeas corpus should be denied, and no certificate of appealability should be issued.

_____/s/ Nisha M. Desai_____
Nisha M. Desai (bar roll no. 512307)
Assistant Attorney General
Criminal Prosecutions Bureau
(212) 416-8589
nisha.desai@oag.state.ny.us

cc: Mr. Malik Robertson, 01-B-2810
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

¹ While respondent has provided the minutes of petitioner's trial proceedings in the instant matter, the minutes of petitioner's first two trials (both of which ended in a mistrial) have not yet been received by respondent. The transcripts of these state court proceedings have been ordered by respondent from the Onondaga County District Attorney's Office. The transcripts will be furnished to the Court if and when they are delivered to respondent.

However, it is respondent's position that the full transcripts of petitioner's first two trials are unnecessary to the resolution of this matter, because, as noted, the pertinent parts of the state proceedings were reproduced in the parties' state appellate briefs. To the extent that this Court's determination would be aided by a summary of the first two state trials, the state appellate briefs, which are appended hereto, contain an ample "narrative summary" of the evidence, which Rule 5 of the Rules Governing §2254 Cases contemplates as a meaningful substitute for the transcript. Cf. Stevenson v. Strack, 96 Civ. 8429 (DC), 1999 WL 294805, fn. 1 (S.D.N.Y. 1999) (relying on the text of a jury charge reproduced in a state appellate brief); see also Bundy v. Wainwright, 808 F.2d 1410, 1415 (11th Cir. 1987) (stating that, if transcripts are unavailable, a narrative summary may be utilized).

DECLARATION OF SERVICE

NISHA M. DESAI, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury as follows:

That on the 18th day of February 2005, she served the annexed Declaration in Opposition to Petition for a Writ of Habeas Corpus and annexed Exhibits upon the following named person:

Mr. Malik Robertson, 01-B-2810
Auburn Correctional Facility
135 State Street
Auburn, New York 13021

petitioner in the within entitled proceeding, by mail, at the address within the State designated by him for that purpose, properly enclosed in a postpaid wrapper, in a post-office box regularly maintained by the United States Postal Service at 120 Broadway, New York, New York 10271.

____/s/ Nisha M. Desai_____
Nisha M. Desai
Assistant Attorney General

Executed on February 18, 2005